

unless the sentence prescribed for the offense is mandatory.

(d) *When directed.* The military judge may direct a post-trial session any time before the record is authenticated. The convening authority may direct a post-trial session any time before the convening authority takes initial action on the case or at such later time as the convening authority is authorized to do so by a reviewing authority.

(e) *Procedure.*

(1) *Personnel.* The requirements of R.C.M. 505 and 805 shall apply at post-trial sessions except that—

(A) For a proceeding in revision, if trial was before members and the matter subject to the proceeding in revision requires the presence of members:

(i) The absence of any members does not invalidate the proceedings if, in the case of a general court-martial, at least five members are present, or, in the case of a special court-martial, at least three members are present; and

(ii) A different military judge may be detailed, subject to R.C.M. 502(c) and 902, if the military judge who presided at the earlier proceedings is not reasonably available.

(B) For an Article 39(a) session, a different military judge may be detailed, subject to R.C.M. 502(c) and 902, for good cause.

(2) *Action.* The military judge shall take such action as may be appropriate, including appropriate instructions when members are present. The members may deliberate in closed session, if necessary, to determine what corrective action, if any, to take. Prior to the military judge *sua sponte* entering a finding of not guilty of one or more offenses charged or entering a finding of not guilty of a part of a specification as long as a lesser offense charged is alleged in the remaining portion of the specification, the military judge shall give each party an opportunity to be heard on the matter.

(3) *Record.* All post-trial sessions, except any deliberations by the members, shall be held in open session. The record of the post-trial sessions shall be prepared, authenticated, and served in accordance with R.C.M. 1103 and 1104 and shall be included in the record of the prior proceedings.

#### **Rule 1102A. Post-trial hearing for person found not guilty only by reason of lack of mental responsibility**

(a) *In general.* The military judge shall conduct a hearing not later than forty days following the finding that an accused is not guilty only by reason of a lack of mental responsibility.

(b) *Psychiatric or psychological examination and report.* Prior to the hearing, the military judge or convening authority shall order a psychiatric or psychological examination of the accused, with the resulting psychiatric or psychological report transmitted to the military judge for use in the post-trial hearing.

(c) *Post-trial hearing.*

(1) The accused shall be represented by defense counsel and shall have the opportunity to testify, present evidence, call witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing.

(2) The military judge is not bound by the rules of evidence except with respect to privileges.

(3) An accused found not guilty only by reason of a lack of mental responsibility of an offense involving bodily injury to another, or serious damage to the property of another, or involving a substantial risk of such injury or damage, has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect. With respect to any other offense, the accused has the burden of such proof by a preponderance of the evidence.

(4) If, after the hearing, the military judge finds the accused has satisfied the standard specified in subsection (3) of this section, the military judge shall inform the general court-martial convening authority of this result and the accused shall be released. If, however, the military judge finds after the hearing that the accused has not satisfied the standard specified in subsection (3) of this section, then the military judge shall inform the general court-martial convening authority of this result and that authority may commit the accused to the custody of the Attorney General.

#### **Rule 1103. Preparation of record of trial**

(a) *In general.* Each general, special, and summary

court-martial shall keep a separate record of the proceedings in each case brought before it.

(b) *General courts-martial.*

(1) *Responsibility for preparation.* The trial counsel shall:

(A) Under the direction of the military judge, cause the record of trial to be prepared; and

(B) Under regulations prescribed by the Secretary concerned, cause to be retained stenographic or other notes or mechanical or electronic recordings from which the record of trial was prepared.

(2) *Contents.*

(A) *In general.* The record of trial in each general court-martial shall be separate, complete, and independent of any other document.

(B) *Verbatim transcript required.* Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting when:

(i) Any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or

(ii) A bad-conduct discharge has been adjudged.

## Discussion

A verbatim transcript includes: all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge; matter which the military judge orders stricken from the record or disregarded; and when a record is amended in revision proceedings ( *see* R.C.M. 1102), the part of the original record changed and the changes made, without physical alteration of the original record. Conferences under R.C.M. 802 need not be recorded, but matters agreed upon at such conferences must be included in the record. If testimony is given through an interpreter, a verbatim transcript must so reflect.

(C) *Verbatim transcript not required.* If a verbatim transcript is not required under subsection (b)(2)(B) of this rule, a summarized report of the proceedings may be prepared instead of a verbatim transcript.

## Discussion

*See also* R.C.M. 910(i) concerning guilty plea inquiries.

(D) *Other matters.* In addition to the matter required under subsection (b)(2)(B) or (b)(2)(C) of this rule, a complete record shall include:

(i) The original charge sheet or a duplicate;

(ii) A copy of the convening order and any amending order(s);

(iii) The request, if any, for trial by military judge alone, or that the membership of the court-martial include enlisted persons, and, when applicable, any statement by the convening authority required under R.C.M. 201(f)(2)(B)(ii) or 503(a)(2);

(iv) The original dated, signed action by the convening authority; and

(v) Exhibits, or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits.

(3) *Matters attached to the record.* The following matters shall be attached to the record:

(A) If not used as exhibits—

(i) The report of investigation under Article 32, if any;

(ii) The staff judge advocate's pretrial advice under Article 34, if any;

(iii) If the trial was a rehearing or new or other trial of the case, the record of the former hearing(s); and

(iv) Written special findings, if any, by the military judge.

(B) Exhibits or, with the permission of the military judge, copies, photographs, or descriptions of any exhibits which were marked for and referred to on the record but not received in evidence;

(C) Any matter filed by the accused under R.C.M. 1105, or any written waiver of the right to submit such matter;

(D) Any deferment request and the action on it;

(E) Explanation for any substitute authentication under R.C.M. 1104(a)(2)(B);

(F) Explanation for any failure to serve the record of trial on the accused under R.C.M. 1104(b);

(G) The post-trial recommendation of the staff judge advocate or legal officer and proof of service

on defense counsel in accordance with R.C.M. 1106(f)(1);

(H) Any response by defense counsel to the post-trial review;

(I) Recommendations and other papers relative to clemency;

(J) Any statement why it is impracticable for the convening authority to act;

(K) Conditions of suspension, if any, and proof of service on probationer under R.C.M. 1108;

(L) Any waiver or withdrawal of appellate review under R.C.M. 1110; and

(M) Records of any proceedings in connection with vacation of suspension under R.C.M. 1109.

(N) Documents pertaining to the receipt of the record of trial by the victim pursuant to subsection (g)(3) of this rule.

### Discussion

Per R.C.M. 1114(f), consult service regulations for distribution of promulgating orders.

#### (c) *Special courts-martial.*

(1) *Involving a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.* The requirements of subsections (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(D), and (b)(3) of this rule shall apply in a special court-martial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, has been adjudged.

(2) *All other special courts-martial.* If the special court-martial resulted in findings of guilty but a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, was not adjudged, the requirements of subsections (b)(1), (b)(2)(D), and (b)(3)(A)-(F) and (I)-(M) of this rule shall apply.

(d) *Summary courts-martial.* The summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305.

(e) *Acquittal; courts-martial resulting in findings of not guilty only by reason of lack of mental responsibility; termination prior to findings; termination after findings.* Notwithstanding subsections (b), (c), and (d) of this rule, if proceedings resulted in an acquittal of all charges and specifications or in a finding of not guilty only by reason of lack of mental responsibility of all charges and specifications, or if the proceedings

were terminated by withdrawal, mistrial, or dismissal before findings, or if the proceedings were terminated after findings by approval of an administrative discharge in lieu of court-martial, the record may consist of the original charge sheet, a copy of the convening order and amending orders (if any), and sufficient information to establish jurisdiction over the accused and the offenses (if not shown on the charge sheet). The convening authority or higher authority may prescribe additional requirements.

### Discussion

The notes or recordings of court-martial proceedings described in this subsection should be retained if reinstitution and re-referral of the affected charges is likely or when they may be necessary for the trial of another accused in a related case. *See* R.C.M. 905(g) and 914.

(f) *Loss of notes or recordings of the proceedings.* If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of subsection (b)(2)(C) of this rule shall be prepared, and the convening authority may:

(1) Approve only so much of the sentence that could be adjudged by a special court-martial, except that a bad-conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may not be approved; or

(2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court-martial.

(g) *Copies of the record of trial.*

(1) *General and special courts-martial.*

(A) *In general.* In general and special courts-martial that require a verbatim transcript under subsections (b) or (c) of this rule and are subject to a review by a Court of Criminal Appeals under Article 66, the trial counsel shall cause to be prepared an original record of trial.

### Discussion

An original record of trial includes any record of the proceedings recorded in a form that satisfies the definition of a "writing" in

R.C.M. 103. Any requirement to prepare a printed record of trial pursuant to this rule, either in lieu of or in addition to a record of trial recorded or compiled in some other format, including electronic or digital formats, is subject to service regulation

(B) *Additional copies.* The convening or higher authority may direct that additional copies of the record of trial of any general or special court-martial be prepared.

(2) *Summary courts-martial.* Copies of the summary court-martial record of trial shall be prepared as prescribed in R.C.M. 1305(b).

(3) *Cases involving sexual offenses.*

(A) “Victim” defined. For the purposes of this rule, a victim is a person who suffered a direct physical, emotional, or pecuniary harm as a result of matters set forth in a charge or specification; and is named in a specification under Article 120, Article 120b, Article 120c, Article 125, or any attempt to commit such offense in violation of Article 80.

(B) *Scope; qualifying victim.* In a general or special court-martial, a copy of the record of trial shall be given free of charge to a victim as defined in subparagraph (A) for a specification identified in subparagraph (A) that resulted in any finding under R.C.M. 918(a)(1). If a victim is a minor, a copy of the record of trial shall instead be provided to the parent or legal guardian of the victim.

### Discussion

This rule is not intended to limit the Services’ discretion to provide records of trial to other individuals.

(C) *Notice.* In accordance with regulations of the Secretary concerned, and no later than authentication of the record, trial counsel shall cause each qualifying victim to be notified of the opportunity to receive a copy of the record of trial. Qualifying victims may decline receipt of such documents in writing and any written declination shall be attached to the original record of trial.

(D) *Documents to be provided.* For purposes of this subsection, the record of trial shall consist of documents described in subsection (b)(2) of this rule, except for proceedings described in subsection (e) of this rule, in which case the record of trial shall consist of items described in subsection (e). Matters attached to the record as described in subsection (b)(3) of this rule are not required to be provided.”

### Discussion

Subsections (b)(3)(N) and (g)(3) of this rule were added to implement Article 54(e), UCMJ, in compliance with the National

Defense Authorization Act for Fiscal Year 2012 (P.L. 112-81, § 586). Service of a copy of the record of trial on a victim is prescribed in R.C.M. 1104(b)(1)(E).

(h) *Security classification.* If the record of trial contains matter which must be classified under applicable security regulations, the trial counsel shall cause a proper security classification to be assigned to the record of trial and on each page thereof on which classified material appears.

### Discussion

See R.C.M. 1104(b)(1)(D) concerning the disposition of records of trial requiring security protection.

(i) *Examination and correction before authentication.*

(1) *General and special courts-martial.*

(A) *Examination and correction by trial counsel.* In general and special courts-martial, the trial counsel shall examine the record of trial before authentication and cause those changes to be made which are necessary to report the proceedings accurately. The trial counsel shall not change the record after authentication.

### Discussion

The trial counsel may personally correct and initial the necessary changes or, if major changes are necessary, direct the reporter to rewrite the entire record or the portion of the record which is defective.

The trial counsel must ensure that the reporter makes a true, complete, and accurate record of the proceedings such that the record will meet the applicable requirements of this rule.

(B) *Examination by defense counsel.* Except when unreasonable delay will result, the trial counsel shall permit the defense counsel to examine the record before authentication.

### Discussion

If the defense counsel discovers errors or omissions in the record, the defense counsel may suggest to the trial counsel appropriate changes to make the record accurate, forward for attachment to the record under Article 38(c) any objections to the record, or bring any suggestions for correction of the record to the attention of the person who authenticates the record.

The defense counsel should be granted reasonable access to the reporter’s notes and tapes to facilitate the examination of the record.

A suitable notation that the defense counsel has examined the record should be made on the authentication page. See Appendix 13 or 14 for sample forms.

(2) *Summary courts-martial.* The summary court-martial shall examine and correct the summary court-martial record of trial as prescribed in R.C.M. 1305(a).

(j) *Videotape and similar records.*

(1) *Recording proceedings.* If authorized by regulations of the Secretary concerned, general and special courts-martial may be recorded by videotape, audiotape, or similar material from which sound and visual images may be reproduced to accurately depict the entire court-martial. Such means of recording may be used in lieu of recording by a qualified court reporter, when one is required, subject to this rule.

(2) *Preparation of written record.* When the court-martial, or any part of it, is recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, a transcript or summary in writing (as defined in R.C.M. 103), as required in subsection (b)(2)(A), (b)(2)(B), (b)(2)(C), or (c) of this rule, as appropriate, shall be prepared in accordance with this rule and R.C.M. 1104 before the record is forwarded under R.C.M. 1104(e), unless military exigencies prevent transcription.

(3) *Military exigency.* If military exigency prevents preparation of a written transcript or summary, as required, and when the court-martial has been recorded by videotape, audiotape, or similar material under subsection (j)(1) of this rule, the videotape, audiotape, or similar material, together with the matters in subsections (b)(2)(D) and (b)(3) of this rule shall be authenticated and forwarded in accordance with R.C.M. 1104, provided that in such case the convening authority shall cause to be attached to the record a statement of the reasons why a written record could not be prepared, and provided further that in such case the defense counsel shall be given reasonable opportunity to listen to or to view and listen to the recording whenever defense counsel is otherwise entitled to examine the record under these rules. Subsection (g) of this rule shall not apply in case of military exigency under this subsection.

(4) *Further review.*

(A) *Cases reviewed by the Court of Criminal Appeals.* Before review, if any, by a Court of Criminal Appeals of a case in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a complete written transcript shall be prepared and certified as accurate in accordance with regulations of the Secretary concerned. The authenticated recording shall be retained for ex-

amination by appellate authorities.

(B) *Cases not reviewed by the Court of Criminal Appeals.* In cases in which the record includes an authenticated recording prepared under subsection (j)(3) of this rule, a written record shall be prepared under such circumstances as the Secretary concerned may prescribe.

(5) *Accused's copy.* When a record includes an authenticated recording under subsection (j)(3) of this rule, the Government shall, in order to comply with R.C.M. 1104(b):

(A) Provide the accused with a duplicate copy of the videotape, audiotape, or similar matter and copies of any written contents of and attachments to the record, and give the accused reasonable opportunity to use such viewing equipment as is necessary to listen to or view and listen to the recording; or

(B) With the written consent of the accused, defer service of the record until a written record is prepared under subsection (4) of this rule.